Supreme Court, U. S.
FILED
JUL 1 1975
MICHAEL RODAK, JR., CLERK

In The

Supreme Court of the United States

October Term, 1974

No. 74-220

COMMONWEALTH OF KENTUCKY, EX REL.
ED W. HANCOCK, ATTORNEY GENERAL,
Petitioner,

v.

RUSSELL E. TRAIN, ADMINISTRATOR,
ENVIRONMENTAL PROTECTION AGENCY, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court
of Appeals for the Sixth Circuit

BRIEF OF THE COMMONWEALTH OF VIRGINIA AS AMICUS CURIAE IN SUPPORT OF PETITIONER

ANDREW P. MILLER
Attorney General of the Commonwealth of Virginia, Amicus Curiae

J. THOMAS STEGER
Assistant Attorney General

Supreme Court Building
1101 East Broad Street
Richmond, Virginia 23219

TABLE OF CONTENTS

Page

INTEREST OF THE AMICUS 1

SUMMARY OF THE ARGUMENT 3

ARGUMENT

I. The Language Of Section 118 Of The Clean Air Act Is Not Restricted To Only Emission Standards Or Standards Of Performance, But Encompasses All Requirements Respecting The Control and Abatement of Air Pollution 4

II. A State Permit System Is A Requirement Respecting The Control And Abatement Of Air Pollution. 8

CONCLUSION 12

TABLE OF CITATIONS

Cases

Old Colony R. Co. v. Commissioner of Internal Revenue, 284 U.S. 552 (1932) 4

Petition of Public Nat. Bank of New York, 278 U.S. 101 (1928) 7

Train v. NRDC, 43 U.S.L.W. 4467 (U.S. April 16, 1975) 7, 9

Statute

FEDERAL

Clean Air Act of 1970, 42 U.S.C. §§ 1857 et seq. 1, 3, 4, 6, 11

In The

Supreme Court of the United States

October Term, 1974

No. 74-220

COMMONWEALTH OF KENTUCKY, EX REL.
ED W. HANCOCK, ATTORNEY GENERAL,
Petitioner,

V.

RUSSELL E. TRAIN, ADMINISTRATOR,
ENVIRONMENTAL PROTECTION AGENCY, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court
of Appeals for the Sixth Circuit

BRIEF OF THE COMMONWEALTH OF VIRGINIA AS AMICUS CURIAE IN SUPPORT OF PETITIONER

INTEREST OF THE AMICUS

The interest of the Commonwealth of Virginia is to seek a determination that the use of permits, when included in a State's program of air pollution control measures, constitutes a requirement which is applicable to federal facilities under Section 118 of the Clean Air Act.

In its program for the achievement and maintenance of ambient air quality standards, Virginia relies on a registration and permit process similar to that of Kentucky. Under paragraph 2.03 of the regulations of the Virginia Air Pol-

lution Control Board all persons owning or operating any existing source of pollution shall have registered such source operation with the Board by June 30, 1972. Under paragraph 2.04 of the regulations any source in existence at the time the regulations became effective shall have been in compliance by June 30, 1972. If compliance was not possible by that date, the person responsible for the operation of that source shall have submitted to the Board, by the same date, a control program and schedule containing a date when full compliance will be achieved.

New sources, defined as those constructed after March 17, 1972, and the modification, after this date, of any source are governed by paragraph 2.06 of the regulations. This paragraph prohibits the commencement or modification of a source until there is first obtained from the Board a permit to construct and operate the source.

Applications for permits from the Virginia Board must include such information as may be required by the Board to determine the effect of the proposed source on the ambient air quality and also to determine compliance with the applicable emission standards. Prior to issuing a permit, the Board must be satisfied that the source will be constructed or modified without causing a violation of the applicable regulations. The Board must also be satisfied that the proposed source can be designed and built in accordance with the utilization of the best available control technology. Additionally, the Board must be satisfied that the proposed source will not compromise the attainment or maintenance of an applicable ambient air quality standard. Finally, an application for a permit must be subject to a public hearing.

In addition to permits for new or modified sources, Virginia has special regulations which require permits for outdoor burning in Standard Metropolitan Statistical Areas. There are no emission standards or standards of performance for such open burning. The issuance of an open burning permit depends upon a determination whether the burning will cause a health or traffic hazard, and whether the material to be burned can be disposed of by other means. Frequently, these permits contain special terms which are tailored to each unique situation.

Virginia's regulations apply to departments and agencies of the Federal government. There are many facilities in Virginia which are owned and operated by such departments and agencies, which engage in activities which result or may result in the discharge of air pollutants. Among these are the Pentagon, Forts Belvoir, Eustis, Lee and Meyer, the Naval Base at Norfolk and the Marine Base at Quantico. These and other Federally operated sources have submitted to the Board registration forms and compliance programs, while at the time stating that application for permits would not be made.

SUMMARY OF ARGUMENT

The plain language of Section 118 of the Clean Air Act states that Federal agencies are required to comply with state requirements to same extent that any person is subject to such requirements. The defendants cannot obfuscate that clear language by imposing upon it their invented distinction between "substantive" and "procedural" requirements. That distinction is not justified by any section of the Clean Air Act or by any reference to its legislative history.

A state permit is an essential requirement for the control and abatement of air pollution. Section 304 of the Clean Air Act, which is the "citizen suit" provision, does not provide a sufficient means for a state to carry out its goal of achieving and maintaining clean air.

ARGUMENT

I.

The Language Of Section 118 Of The Clean Air Act Is Not Restricted To Only Emission Standards Or Standards Of Performance, but Encompasses All Requirements Respecting The Control And Abatement Of Air Pollution.

The first sentence of Section 118 of the Clean Air Act of 1970, 42 U.S.C. § 1857f, states:

> "Each department, agency, and instrumentality of the executive, legislative, and judicial branches of the Federal Government (1) having jurisdiction over any property or facility, or (2) engaged in any activity resulting, or which may result, in the discharge of air pollutants, shall comply with Federal, State, interstate, and local requirements respecting control and abatement of air pollution to the same extent that any person is subject to such requirements."

The question presented in this case is, therefore, does the permit system adopted by the Kentucky Air Pollution Control Commission constitute one of these "requirements respecting control and abatement of air pollution."

In construing these words of Section 118, the general rule is that the legislature must be presumed to use words in their known and ordinary signification. *Old Colony R. Co.* v. *Commissioner of Internal Revenue*, 284 U.S. 552, 560 (1932). The word "requirement" is self-explanatory. The ordinary meaning of "respecting" is "with regard or relation to." Webster's Third New International Dictionary, G. & C. Merriam Co. (1968). Therefore, the applicability to Federal agencies of Kentucky's permits, which are clearly requirements, must be judged with regard or relation to the effect of these permits on the control and abatement of air pollution.

All of the defendants herein contend that the phrase "requirements respecting control and abatement of air pollution" means simply that Federal facilities must comply with the emissions standards and "substantive" portions of implementation plans of Sections 109 and 110 of the Clean Air Act, and, except for new facilities, the monitoring and other requirements of Section 114. Defendants further contend that permit systems are merely "procedural" and consequently have nothing to do with the control and abatement of air pollution. Defendants argue that the legislative history of the Act supports their interpretation. The Courts below agreed with the defendants.

We would respectfully submit that the analysis of the legislative history made by the defendants and the Courts below is erroneous. The legislative history of Section 118 does not inexorably lead to the conclusion that the "requirements" in question mean only emissions and air quality standards. The version of Section 118 passed by the House of Representatives would have required Federal facilities to comply with State and local emission standards. H.R. 17255, 91st Cong., 2d sess., sec. 111 (1970). The Senate-passed version would have required Federal facilities to comply with the "requirements" of this Act. S. 4358, 91st Cong., 2d sess., sec. 118 (1970). The Senate Report on the bill states, "This section requires that Federal facilities meet the emission standards necessary to achieve ambient air quality as well as those established in other sections of Title I." S. Rept. No. 91-1196, 91st Cong., 2d sess., p. 23 (1970). The final language of Section 118 emerged from the Conference Committee. Concerning this new and final language the conference report stated, "The House bill and the Senate amendments declare that Federal departments and agencies should comply with applicable standards

of air qualtiy and emissions." H. Rept. No. 91-1783, 91st Cong. 2d sess., p. 48 (1970).

Since the various reports refer just to standards of air quality and emissions, defendants appear to be urging that the maxim "expresio unius est exclusio alterius" applies through the reports to the statute itself. But Section 118 does not use the words "emission standards"; it speaks of state and local requirements respecting the control and abatement of air pollution. This language is broader and more inclusive than the words "emission standards."

Such State requirements are to be found in the State implementation plans, the context of which is governed by Section 110 of the Clean Air Act. Under subparagraph (a)(2)(B) of this Section, the plans, which provide for the implementation, maintenance and enforcement of ambient air quality standards, must include not only emission limitations and compliance schedules but "such other measures as may be necessary to insure attainment and maintenance of such primary or secondary standard, including, but not limited to, land-use and transportation controls." Thus, if a particular State's permit system can be determined to be a measure which is necessary to insure attainment and maintenance of an air quality standard, it is clearly a requirement respecting the control and abatement of air pollution just as are emission limitations or standards. Surely, land-use and transportation controls, could not be effectuated by emission controls alone, but would necessarily depend upon some other regulatory scheme, such as permits involving the use of land.

The full intent of the phraseology used in Section 118 is further clarified by reference to Section 116 of the Clean Air Act. That Section provides in part:

> ". . . nothing in this chapter shall preclude or deny the right of any State or political subdivision thereof

> to adopt or enforce (1) any standard or limitation respecting emissions of air pollutants or (2) any requirement respecting control or abatement of air pollution; . . ." 42 U.S.C. 1857d-1.

Clause (2) of this Section is essentially the same as that found in Section 118. It is a cardinal rule of statutory construction that a statute ought, upon the whole, be so construed that, if it can be prevented, no clause, sentence or words shall be superfluous, void or insignificant. *Petition of Public Nat. Bank of New York,* 278 U.S. 101 (1928). Therefore, in accordance with this rule of construction, the phrase "any requirement respecting control or abatement of air pollution" must be construed as meaning more than a mere redundant expression of the clause "any standard or limitation respecting emission of air pollutants."

It should also be noted that Federal agencies have not been recalcitrant in seeking relief under State "procedures," when it works to their advantage. For instance, Virginia's regulations expressly provide that all sources were to be in compliance with categorical emission limitations on June 30, 1972. This requirement is the same as that found in the Georgia plan, which was discussed by this Court in *Train* v. *NRDC,* 43 U.S.L.W. 4467 (U.S. April 16, 1975). But, as this Court stated in *Train,* the Georgia plan "incorporated a variance procedure whereby particular sources could obtain individually tailored relief from general requirements." *Id.* at 4469. Virginia incorporated a similar procedure for relief from the 1972 compliance date; the source may submit, to the Virginia Board, a compliance schedule which, when approved by the Board, permits deferred compliance. Obviously, the interim timetables and circumstances for each such schedule are not spelled out as "substantive" regulations, but are worked out "administratively" between the Board and the source. Also, the compliance schedule, as

a specific revision to the initial plan, is subject to a public hearing conducted by the Board's staff. Needless to say, some Federal agencies have opted for this deferral procedure, and are now under compliance schedules. These Federal agencies, however, should have been in complete compliance with the emission standards in 1972, if they wish to be consistent with their "substantive/procedural" hypothesis. The actual inconsistency of their behavior reveals the senselessness of relying on mere semantical differences.

II.

A State Permit System Is A Requirement Respecting The Control And Abatement Of Air Pollution.

A permit system is an effective and necessary tool in achieving and maintaining clean air. The permit system facilities identification and evaluation of the source's need for air pollution control equipment. It insures that existing or proposed air pollution control devices be of sufficient collection efficiency to minimize potential air pollution. It prevents the construction or modification of uncontrolled sources. An applicant for a permit is expected to make any necessary changes on the drawing board, rather than on the physical plant itself. It is to the applicant's financial advantage to come forward with its control proposals and plans at a stage when review and correction, if needed may be more easily accomplished.

The permit system specifies and clarifies the source owner's pollution control responsibility in one action. Litigation over an alleged violation of emission standards, or other factors, during which the public might suffer the effects of air pollution, is avoided. Of course, if a permit is denied to an applicant, he may seek judicial review. This litigation, however, is carried out on the applicant's time,

not the public's, for until a permit is issued, the applicant cannot operate the source. *See Train, id.* at 4477.

Furthermore, the permit system will prevent a source from possibly degrading the air below an air quality standard. It can be used to allocate available clean air among several sources, and equalize the burden of pollution control. It would be an important consideration in any administrative program which depends upon flexibility and ingenuity to deal with problems of allocation. *See Train, id.* at 4477.

The Circuit Court of Appeals below did not ignore the need and power of the States to control air pollution from Federal sources. It stated, however, that these elements could be satisfied by proceeding under Section 304 of the Act, which is the "citizen suit" provision. The Court below believed that this Section could not only be used to abate pollution, but to prevent it as well, by bringing an action whenever a Federal source failed to meet a level prescribed in a schedule or timetable of compliance.

We do not believe that Section 304 provides a satisfactory solution. In the first place, if the State permit requirement is eliminated with respect to Federal sources, and if Section 304 is the sole means of challenging the sufficiency of Federal pollution control efforts, then, in essence, these Federal agencies are allowed to license themselves, in accordance with their own determination as to what the State requires, and the judiciary, not the expert regulatory agency, becomes the judge of the accuracy of these determinations. The traditional role of the judiciary, as the reviewer of decisions made by expert regulatory agencies, is set aside and instead the judiciary becomes the primary trier of fact. The expert regulatory agency looses that initial element of decision-making which has become the hallmark of modern administrative process, and to which, under a permit system, all sources would be subject.

Secondly, exclusive reliance on Section 304 would require the State agency to make a Federal case out of every suspected violation or questioned act of the Federal source, including those doubts regarding the Federal source's evaluation of its proposed conformance to the State standards. This will either result in an inordinate burden upon the judiciary, or it will encourage the State to suppress those doubts and questions. The objective of insuring that Federal sources fulfill their pollution control responsibilities is not served in that fashion. And it must always be remembered that, during the pendency of this litigation, which can be complex and lengthy, the Federal source would be operating and putting out possibly dangerous levels of pollution. That would be avoided if the Federal source would wait, like everyone else must, until its proposed operation has been approved and permitted by the State agency.

To deprive the State of its permit requirement and to insist that all efforts to control Federal sources must be brought under Section 304, is also to deprive the state's citizens of an opportunity to voice their concern in an inexpensive and efficient proceeding. This opportunity is the public hearing, which some states, including Virginia, require before a permit is issued. These public hearings sometimes provide information which both the State agency and the Federal source may not be aware of. Federal sources should not fear these public hearings for permits, because public hearings are also a requirement for specific revisions or variances to emission limitations, which Federal sources have requested, and can be expected to request, from time to time.

Finally, Section 304 is of no value in either preventing or abating open burning violations. There are no emission standards or standards of performance applicable for open

burning. In Standard Metropolitan Statistical Areas, where permits are required, the criteria involves the effects on local health and traffic, and also a consideration of alternate means of disposal of the substance desired to be burned. Furthermore, Section 304 requires that the alleged violators be given 60 days' notice before an action is commenced. Most open burning, however, can be completed within a few days. The damage, if any, has been done before a suit can be commenced. A permit system minimizes problems resulting from open burning, which, to many citizens, is one of the most evident and bothersome aspects of the total spectrum of air pollution.

It is submitted, therefore, that a permit system ought to be regarded as a requirement respecting the control and abatement of air pollution, and which is thus expressly made applicable, under Section 118, to federal sources. The distinction between "substantive" and "procedural" requirements, which the Courts below accepted, and gave effect to, in a summary fashion, is irrelevant, and not justified by the language of the Clean Air Act.

CONCLUSION

The order appealed from should be reversed and the plaintiff's motion for summary judgment should be granted.

Respectfully submitted,

ANDREW P. MILLER
Attorney General of the Commonwealth of Virginia, Amicus Curiae

J. THOMAS STEGER
Assistant Attorney General

Supreme Court Building
1101 East Broad Street
Richmond, Virginia 23219